No. 12,277

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUISE K. GODFREY,
Appellant,

vs.

JAMES G. SMYTH, United States Collector of Internal Revenue at San Francisco, California,
Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

The appeal is by the plaintiff from an adverse judgment in her action to recover a federal estate tax paid under protest. R. 45. Plaintiff has also appealed from the order denying a motion to amend findings and judgment. R. 45.

STATEMENT OF JURISDICTION.

The action was against a Collector of Internal Revenue to recover taxes paid under protest. R. 2-11. The District Court had jurisdiction. 28 U.S.C.A., sec. 41 (5), now 28 U.S.C.A., sec. 1340. The judgment ap-

pealed from was entered January 24, 1949. R. 32. Plaintiff's motion for new trial, filed February 1, 1949, was denied May 2, 1949. R. 42-44. A motion to amend the findings and judgment was denied the same day. R. 42-44. Notice of appeal was filed May 27, 1949. R. 45. The appeal was timely taken, R. 45, and timely docketed, R. 135. Rules of Civil Procedure, Rule 73, (a) and (g). Under 28 U.S.C.A., secs. 1291, 1294, this Court has jurisdiction to review the judgment and order of the District Court.

STATEMENT OF THE CASE.

William S. Godfrey, Jr., died testate at and resident of San Francisco in November of 1944. R. 24, 107-108. His widow, appellant Louise K. Godfrey, was named executrix in his last will, dated March 4, 1930, and as sole beneficiary thereunder. R. 24, 108-110. The estate was duly administered and distributed to appellant in July of 1945. R. 25, 102-105. At the time of his death, Mr. Godfrey was the insured under two policies of life insurance in the New York Life Insurance Company, aggregating $40,000, payable to a trustee for the use and benefit of the widow and two children. R. 19-24. During the administration of the estate the taxing authorities collected and appellant paid, under protest, an estate tax thereon of $10,088.90. R. 25-26. The present action was brought to obtain the refund thereof. R. 10-11. The question in the District Court and here is whether the proceeds of these life insurance policies were includible

in the gross estate of Mr. Godfrey for federal estate tax purposes. If they were, the judgment of the District Court is right and should be affirmed. If they were not, the judgment of the District Court is wrong and should be reversed. Photostatic copies of the two policies involved were admitted in evidence at the trial and are reproduced in the record. R. 55-61, 66-70A.

The first policy was No. 8751507 for $15,000. R. 55. The insurer was New York Life Insurance Company. R. 55. The insured was William S. Godfrey, Jr. R. 55. He was then 36 years of age. R. 55. It was dated May 9, 1924, R. 55, but was effective as of April 24, 1924, R. 55. The beneficiary was designated as "the Executors, Administrators or Assigns of the insured or to the duly designated Beneficiary (with the right on the part of the insured to change the Beneficiary in the manner provided in Section 7)". R. 55. Said Section 7 provided: "Change of Beneficiary. —The insured may at any time, and from time to time, change the beneficiary, provided this Policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment

made by it before such indorsement. In the event of the death of any beneficiary, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein". R. 60. The policy also extended to the insured coverage against total and permanent disability and provided for disability benefits and waiver of all premiums under the policy in the event of such casualty. R. 55, 57.

Two trust agreements, dated June 5, 1924, and executed by the insurer as trustor, accepted by the insurer as trustee, and consented to by appellant as "wife of the insured", were annexed to the policy. R. 53-54. One appointed the insurer trustee of one-half of the proceeds of the policy, receivable on the death of the insured in trust for appellant as First Beneficiary, and payable to her in designated monthly instalments or, in the event of appellant's death, in like manner to Norma Louise Godfrey, daughter of the insurer and appellant, as Second Beneficiary. R. 53. It was also provided: "In the event of the death of both Beneficiaries said Company, as Trustee, shall pay any balance of said one-half of the proceeds remaining in its possession, to the Executors or Administrators of the last surviving Beneficiary in one sum". R. 53. Another provision was as follows: "If said Company accepts this Trust, this appointment and the Trust shall become null and void (a) if I shall revoke said appointment by written notice to said Company filed at its Home Office; (b) if I shall survive both said beneficiaries; (c) if any change be made in the beneficiary or manner of payment of the proceeds of

said policy; (d) if said policy shall be surrendered for cash surrender value; (e) if at my death the net sum payable under said policy shall be less than Four Thousand Dollars; (f) if I shall assign said policy and said assignment or written notice thereof be filed with the Company at its Home Office." R. 53. The other trust agreement was of corresponding date, form, and contents, but had reference to the other one-half of the proceeds of the policy and the Second Beneficiary was William Sherman Godfrey Jr., son of insured and appellant. R. 56.

The second policy was No. 10899287 for $25,000. R. 66. The insurer was New York Life Insurance Company. R. 66. The insured was William S. Godfrey, Jr. R. 66. He was then 41 years of age. R. 66. It was dated December 21, 1929, but was effective as of December 9, 1929. R. 66. The beneficiary was designated as "the Executors, Administrators or Assigns of the insured, or to the duly designated Beneficiary (with right on the part of the insured to change the Beneficiary in the manner provided herein)". R. 66. The policy contained no provision, however, respecting manner of change of beneficiary. In the subdivision entitled "Other Provisions", it merely provided a ruled space with the heading "Register of Change of Beneficiary", accompanied by a note "No change of Beneficiary shall take effect unless indorsed on this Policy by the Company at the Home Office", and appropriate columns for "Date of Request", "Beneficiary", and "Indorsed by". R. 28, 69. The policy also extended to the insured coverage against total and

permanent disability and provided for disability benefits and waiver of all premiums under the policy in the event of such casualty. R. 66-67.

Two trust agreements, dated February 24, 1930, and executed by the insurer as trustor, accepted by the insurer as trustee, and consented to by appellant as wife of the insured, were annexed to the policy. R. 64-65. In form and contents they substantially corresponded in all material respects to the trust agreements previously mentioned and quoted. R. 64-65.

The insured and appellant were married in 1916. R. 28. Their son William was born in 1918; their daughter Norma in 1919. R. 131. All premiums on the said policies were paid with the community funds of the insured and appellant. R. 29. In 1937, the insured became totally and permanently disabled, and was adjudged an incompetent person and appellant was appointed guardian of his person and estate. R. 24, 98-100. Thereafter, no premiums were paid for said life insurance policies and under the terms thereof no premiums were to be paid. R. 24. The disability of the insured continued until his death in November of 1944. R. 24.

Appellant consented to each trust agreement above mentioned on the oral agreement and understanding with her husband, the insured, that he would always keep up intact and in full force and effect for the benefit and protection of appellant and the children the life insurance policy to which the trust agreement referred and was annexed, and that he would see that

the premium payments on each said policy were kept up and that she and the children would be the beneficiaries thereunder. R. 19, 22.

In the federal estate tax return made by appellant in her husband's estate she did not include in the gross estate the proceeds of said life insurance policies. R. 25. The taxing authorities held they were includible in the gross estate and collected $10,088.90 thereon, and appellant paid that sum under appropriate protest and claim of refund. R. 25-26.

The findings of fact made by the District Court are in accord with the facts above stated. R. 18-29. But other findings are adverse to appellant and are challenged by specifications of error herein as lacking evidentiary support and as being contrary to the evidence. These challenged findings (No. III, R. 19-20; No. VIII, R. 21-22; No. XVII, R. 26-27) will be quoted later, but their general effect was that the agreement and understanding between appellant and her husband respecting the trust agreements did not amount to a contract, did not thereby transfer to appellant and her children the whole beneficial interest in the policies of insurance, did not destroy the community character of the property of the insured and his wife in said policies, and that the proceeds of said policies were includible in the gross estate of the husband for federal tax purposes and had been properly taxed. The six conclusions of law, later quoted, drawn by the court from the findings of fact were adverse to appellant, R. 29-30, are challenged by appellant as contrary to law and each is the subject of a separate

specification of error herein. After judgment was entered, appellant made a motion to amend the findings, conclusions of law, and judgment to accord with the facts and the law, and appellant also moved for a new trial. R. 32-42. A specification of error is addressed to the denial of each of these motions.

SPECIFICATIONS OF ERROR.

1. The District Court erred in finding that the agreement and understanding between appellant and her husband respecting the trust agreements annexed to the $15,000 policy was not a contract and did not thereby transfer to appellant and her children the whole beneficial interest in said policy or destroy the community character of the property of the insured and his wife in the policy, for the reason that the evidence is insufficient to support the finding and the finding is contrary to the evidence and the law.

2. The District Court erred in finding that the agreement and understanding between appellant and her husband respecting the trust agreements annexed to the $25,000 policy was not a contract and did not thereby transfer to appellant and her children the whole beneficial interest in said policy or destroy the community character of the property of the insured and his wife in the policy, for the reason that the evidence is insufficient to support the finding and the finding is contrary to the evidence and the law.

3. The District Court erred in finding that the proceeds of the insurance policies were includible in the gross estate of the husband for federal estate tax purpose and had been properly taxed, for the reason that the evidence is insufficient to support the finding and the finding is contrary to the evidence and the law.

4. The District Court erred in concluding as a matter of law that decedent insured retained the right until his death in conjunction with plaintiff, his wife, to designate the persons who should possess or enjoy New York Life Policies 8751507 and 10899287 or the proceeds thereof, for the reason that the conclusion is contrary to the law and the evidence.

5. The District Court erred in concluding as a matter of law that the insured, as manager of the community of himself and plaintiff, at his death possessed incidents of ownership in said policies within the meaning and intent of Section 811 (g) of the Internal Revenue Code as amended by Section 404 of the Revenue Act of 1942, for the reason that the conclusion is contrary to the law and the evidence.

6. The District Court erred in concluding as a matter of law that defendant as collector and the Commissioner of Internal Revenue properly included $40,000.00, representing the proceeds of said policies, in the estate of said insured for Federal Estate Tax purposes, for the reason that the conclusion is contrary to the law and the evidence.

7. The District Court erred in concluding as a matter of law that plaintiff did not over-pay the

Federal Estate Taxes on the estate of said insured, for the reason that the conclusion is contrary to the law and the evidence.

8. The District Court erred in concluding as a matter of law that there was no over-payment of the Federal Estate Tax on the Estate of William S. Godfrey, Jr., deceased, for the reason that the conclusion is contrary to the law and the evidence.

9. The District Court erred in concluding as a matter of law that defendant is entitled to judgment against plaintiff for his costs to be taxed, for the reason that the conclusion is contrary to the law and the evidence.

10. The District Court erred in denying appellant's motion to amend the findings of fact, conclusions of law, and judgment.

11. The District Court erred in denying appellant's motion for a new trial.

ARGUMENT.

SUMMARY OF ARGUMENT.

The determinative question here is whether the proceeds of the two life insurance policies were includible in the gross estate of the insured for federal estate tax purposes. The District Court answered that question in the affirmative. The insured died in 1944 and the Revenue Act of 1942 controls. Under that Act, the determinative question must be answered in the negative if the insured did not possess at the time

of his death an incident of ownership to the policies upon his life. The record establishes that at the time of his death the insured did not possess any such incident, for he had waived and relinquished all incidents of ownership to the policies and had transferred them to his wife and children for good consideration. The judgment of the District Court is erroneous and should be reversed. The motion for new trial and the motion to amend the findings, conclusions of law, and judgment were erroneously denied.

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1. **THE PROCEEDS OF THE LIFE INSURANCE POLICIES WERE NOT INCLUDIBLE IN THE GROSS ESTATE OF THE INSURED FOR FEDERAL ESTATE TAX PURPOSES, FOR THE REASON THAT THE INSURED HAD WAIVED AND RELINQUISHED ALL INCIDENTS OF OWNERSHIP TO THE POLICIES UPON HIS LIFE AND HAD TRANSFERRED THEM TO HIS WIFE AND CHILDREN FOR GOOD CONSIDERATION. (Specifications of Error, Nos. 1, 2, 3.)**

The insured died in 1944. R. 24. He had been totally and permanently disabled and an adjudged incompetent person since 1937. R. 24. By reason of waiver stipulations in the policies applicable to such status and its continuance no premiums for the life insurance were thereafter payable or paid. R. 24. The Revenue Act of 1942 controls. Pertinent provisions of that Act respecting the includibility of the proceeds of life insurance for federal estate tax purposes in the estate of a deceased insured, are as follows (26 U.S.C.A., Int. Rev. Acts Beginning 1940, pp. 332-333):

"Section 404. Proceeds of Life Insurance

(a) General rule. Section 811 (g) (relating to life insurance) is amended to read as follows:

'(g) Proceeds of life insurance * * *

'(2) Receivable by other beneficiaries. To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term "incident of ownership" does not include a reversionary interest.

'(3) Transfer not a gift. The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part, under Chapter 4 or, in case the transfer was

made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

'(4) Community property. For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term "incident of ownership" includes incidents of ownership possessed by the decedent at his death as manager of the community.' * * *

(c) Decedents to which amendments applicable. The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy.' "

When the rules above quoted are applied to the facts of this case, it is very obvious that if the insured at the time of his death did not possess any incidents of ownership to the policies upon his life, the proceeds

of the policies were not includible in his gross estate for federal estate tax purposes, and the judgment of the District Court is wrong.

The record before the court establishes that at the time of his death the insured did not possess any such incidents, for he had waived and relinquished all incidents of ownership to the policies upon his life and had transferred them to his wife and children for good consideration.

As to the policy for $15,000, the District Court found (Finding No. III, R. 19-20):

> "Referring to the allegations of paragraph III of plaintiff's complaint, it is true that subsequent to the issuance of the policy No. 8751507 on April 24, 1924, decedent William S. Godfrey, Jr., requested plaintiff, then his wife, and now his widow, to consent to the execution of a trust agreement in the proceeds of said policy mentioned in paragraph IV of plaintiff's complaint, and plaintiff stated that she would do so and said decedent, William S. Godfrey, Jr., stated that he would always keep up said policy intact for the benefit and protection of plaintiff and her children. That at and before the signing by her of the consent to the trust agreement mentioned in plaintiff's complaint, Mr. Godfrey stated to Mrs. Godfrey that he would see that the premium payments would be kept up and that she and the children would be the beneficiaries in the manner subsequently effected by the trust agreements. That at the time said discussion took place, the greatest bond of affection and confidence existed between the insured and his wife.

By the creation of the trust, the insured was seeking to make the best possible provision for his wife and his children. The trust had the effect of making the wife and children beneficiaries and of conserving the funds all for their benefit. *But the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policy was destroyed."* (Emphasis added.)

To the extent that the above finding (No. III, R. 19-20) is emphasized, it is challenged by Specification of Error No. 1 as unsupported by the evidence and as contrary to the evidence and the law.

As to the policy for $25,000, the District Court found (Finding No. VIII, R. 22-23):

"Referring to the allegations of paragraph VIII of said complaint, it is true that on February 24, 1930, insured requested plaintiff to consent to his entering into the trust agreement with the insurance company in the proceeds of policy No. 10899287 and that plaintiff stated that he might enter into such trust agreement and insured stated to plaintiff that he would keep up said policy intact and in full force and effect for

> the benefit and protection of plaintiff and her children, and said insured then and there stated to plaintiff that he would see that the premium payments would be kept up and that she and her children would be the beneficiaries in the manner subsequently effected by the trust agreements, *but the court does not conclude that a contract existed or that this destroyed the community character of the property. That neither William S. Godfrey, Jr., nor plaintiff intended thereby to enter into a contract and neither statement was made as a condition to or because of a statement or promise by the party to whom it was made. It is not true that there was thereby transferred to plaintiff and her children the whole beneficial interest in said policy or that the community character of the property of the insured and his wife in said policies was destroyed.*" (Emphasis added.)

To the extent that the above finding No. VIII, R. 22-23) is emphasized, it is challenged by Specification of Error No. 2 as unsupported by the evidence and as contrary to the evidence and the law.

Unquestionably, each policy here involved was originally community property of the insured and his wife, the appellant. On each occasion that she consented to the creation of a trust in the proceeds of insurance upon his life she then had a vested interest as to one-half the insurance to be affected by the trust, and neither her husband nor the children could deprive her of that one-half interest or her right to dispose of it as she saw fit. (*Grimm v. Graham,* 26 Cal. 2d 173, 175, 157 P. 2d 841; *Wissner v. Wissner,*

89 A.C.A. 857, 861-864, 201 P. 2d 823; *Mazman v. Brown,* 12 Cal. App. 2d 272, 273, 53 P. 2d 539.) In turn, and originally, her husband also had a vested interest as to one-half of such insurance, and neither she nor the children could deprive him of that one-half interest or his right to dispose of it as he saw fit. *(Travelers Ins. Co. v. Fancher,* 219 Cal. 351, 356, 26 P. 2d 482.) But in California a husband and wife may freely and liberally deal with each other respecting property rights and by a very informal oral agreement and understanding transmute community property into separate property or from any other character to a different one. *(United States v. Pierotti,* 9 Cir. 1946, 154 F.2d 758; *Rogan v. Kammerdiner,* 9 Cir. 1944, 140 F.2d 569, 570; *Greenwood v. Com. Int. Rev.,* 9 Cir. 1943, 134 F.2d 914, 919-920; *Estate of Watkins,* 16 Cal. 2d 793, 797, 108 P.2d 417; *Estate of Raphael,* 91 A.C.A. 1079, 1085-1086, 206 P.2d 391.)

The facts found by the District Court unmistakably show that preceding the creation of each trust and the giving by the wife of her necessary consent thereto, it was orally agreed and understood by the spouses that the husband would maintain the insurance intact for the full amount and that the wife and children should always be and remain the beneficiaries thereunder. (Findings Nos. III and VIII, R. 19-20, 22-23.) The legal effect of this oral agreement and understanding was to transmute into the separate property of each spouse one-half the community insurance in order that a trust in that insurance be created for the benefit of the wife and children. It would be manifestly unjust to ignore such collateral agreement and under-

standing and to consider the trust agreement alone, and to assume and conclude as the District Court assumed and concluded, that the trust agreement merely served to divest the wife of her one-half interest in the insurance and confer upon the husband the unlimited right and power to dispose of the insurance as he saw fit to the exclusion of his wife and children. That assumption and conclusion, manifestly, is the equivalent of saying that the wife was to receive nothing in exchange for divesting herself of one-half the insurance or, in round figures, one-half of $40,000. The obvious and just conclusion from the facts, of course, is that the oral agreement and understanding between the spouses collateral to the trust was a binding and enforceable agreement whereby the wife and children acquired an equitable interest, as beneficiaries of the insurance, which the husband was powerless to impair, divest, or destroy. (*Thompson v. Thompson,* 8 Cir. 1946, 151 F.2d 581, 585; *Dixon Lumber Co. v. Peacock,* 217 Cal. 415, 418, 19 P.2d 233; *Shoudy v. Shoudy,* 55 Cal. App. 344, 348, 203 P. 433.)

From the foregoing considerations it logically follows that the insured had waived and relinquished all incidents of ownership to the policies upon his life and had transferred them to his wife and children, and that therefore the proceeds of the life insurance policies were not includible in his gross estate for federal estate tax purposes. (*Morse v. Com. Int. Rev.,* 7 Cir. 1938, 100 F.2d 593, 596; *Com. Int. Rev. v. Sharp,* 3 Cir. 1937, 91 F.2d 804, 805; *Helvering v. Parker,* 8 Cir. 1936, 84 F.2d 838, 839-840; *Pennsyl-*

vania Co. etc. v. Com. Int. Rev., 3 Cir. 1935, 79 F.2d 295, 296-297.)

What has been said above respecting Specifications of Error Nos. 1 and 2 has equal application to Specification of Error No. 3 which challenged finding No. XVII (R. 26-27) as unsupported by the evidence and as contrary to the evidence and the law. The finding reads (R. 26-27):

> "It is not true that by reason of inclusion of the proceeds of said two insurance policies the amount of the correct tax liability of said estate was not the sum of $15,067.01, as stated in the report of the defendant collector; it is not true that there was no deficiency due said collector or that the total amount of said tax was only $4988.01, or that the sum paid such collector is in excess of the proper amount of said tax or that there is now due, owing or unpaid from the United States of America to plaintiff the said sum of $10,088.90, or any part thereof."

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2. THE DISTRICT COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT AT THE TIME OF HIS DEATH THE INSURED POSSESSED INCIDENTS OF OWNERSHIP TO THE POLICIES UPON HIS LIFE, THAT THE PROCEEDS THEREOF WERE PROPERLY INCLUDIBLE IN HIS GROSS ESTATE FOR FEDERAL ESTATE TAX PURPOSES, THAT PLAINTIFF WAS NOT ENTITLED TO JUDGMENT, AND THAT DEFENDANT WAS ENTITLED TO JUDGMENT FOR COSTS. (Specifications of Error, Nos. 4, 5, 6, 7, 8, 9.)

Following the findings of fact the District Court made six conclusions of law adverse to plaintiff and summarized in the above heading. (R. 29-30). Each

said conclusion of law was challenged herein by a separate Specification of Error (Nos. 4-9) as contrary to the law and the evidence. It will be obvious to the court that arguments in support of these Specifications of Error would merely duplicate arguments made in the preceding subdivision. Appellant deemed it necessary to make separate Specifications of Error in order to comply with the rules of this court and to preserve her claims of error. She does not deem it necessary, however, to burden the court with repetition in argument.

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3. **THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT. (Specification of Error No. 10.)**

Appellant moved to set aside Findings Nos. III, VIII, and XVII, earlier quoted, to set aside the six conclusions of law, above discussed, to vacate the judgment, and to have other and different findings, conclusions, and judgment entered in lieu thereof. R. 33-41. In general, the motion sought to eliminate from Findings Nos. III and VIII the matters to which emphasis was added when the findings were quoted, to add a new finding (No. XA, R. 37) to the effect that the trust agreements transferred to plaintiff and her children the whole beneficial interest in the policies, to negative Finding No. XVII (R. 37-38), to negative the conclusions of law (R. 38-39), and to enter a judgment in favor of plaintiff (R. 40). The motion was denied. R. 42. Because the motion chal-

lenged the sufficiency of the evidence to support the judgment for defendant, a separate Specification of Error was addressed to the denial of the motion. And because the order of denial was made after judgment was entered, an appeal was specifically taken therefrom. R. 45. Additional arguments in support of Specification of Error No. 10 are unnecessary.

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4. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL. (Specification of Error No. 11.)

Appellant moved for a new trial on grounds raising the points covered by the other Specifications of Error (except Specification of Error No. 10) and the motion was denied. R. 33-34,44. Appellant is mindful that the granting or refusing of a new trial rests in the sound discretion of the trial court. But discretion may be abused. Here an abuse of discretion in denying the motion for new trial is plainly manifest.

CONCLUSION.

Appellant respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco,
September 19, 1949.

I. M. PECKHAM,
Attorney for Appellant.